STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2001-839

January 8, 2002

COMPETITIVE ENERGY SERVICES
MAINE ELECTRIC CONSUMER COOPERATIVE
Request for Emergency Rulemaking to
Amend Chapter 322

ORDER DENYING
REQUEST FOR
EMERGENCY
RULEMAKING

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

We deny the request for emergency rulemaking of Competitive Energy Services, LLC and the Maine Electric Consumer Cooperative (CES/MECC).

II. BACKGROUND

On December 5, 2001, CES/MECC requested that the Commission initiate an emergency rulemaking process to protect competitive aggregators and brokers from losing funds through the consolidated utility billing process. Specifically, CES/MECC request that the Commission amend Chapter 322 on an emergency basis to require a utility to segregate that portion of the money collected from customers for competitive generation service that represents a fee for aggregator/broker service. CES/MECC state that it would be harmful to the competitive market to expose aggregators and brokers to the risk of losing their fees if the fees are transferred by the utility to a competitive supplier that is insolvent and unlikely to remit the fees back to the aggregator or broker. CES/MECC argue that the emergency rulemaking standard is satisfied in that the financial collapse of Enron has put at risk aggregation and brokering efforts in Maine which have been key to the State's success with retail competition. This risk, according to CES/MECC, is the result of payment collection and distribution protocols adopted pursuant to Commission rules.

Central Maine Power Company (CMP) opposes the emergency request to amend Chapter 322 in that it would improperly force transmission and distribution (T&D) utilities to act as collection agents for third-party aggregators who impermissibly seek to avoid bankruptcy court jurisdiction. CMP argues that the standard for emergency rulemakings is not met in that the only immediate harm CES/MECC point to is the risk of financial harm to those who have done business with Enron; the risk is not to the public, but to the financial interests of CES/MECC. CMP also argues that the matter involving entitlement to the CES/MECC fees is now within the exclusive jurisdiction of the bankruptcy court, and the Commission is being asked, in effect, to rewrite the contractual relationships between CMP and Enron and between CES/MECC and Enron. Finally, CMP states that its billing system is incapable of performing the requested service and it would thus be a labor intensive, manual process.

Maine Public Service Company (MPS) did not object to the rule amendment, but states that its implementation would create substantial administrative costs. These costs, according to MPS, should be recovered from the aggregator or broker.

AES NewEnergy, Inc. (AES) expressed concern about the potential impact of the rule change and the Commission's authority to retroactively affect existing contracts. AES states that an emergency rulemaking is not the proper forum for the proposed amendment to Chapter 322.

III. DISCUSSION

We deny the CES/MECC request because we cannot conclude that the emergency rulemaking standard is satisfied under the current circumstances. In addition, the requested action would impermissibly impinge on the jurisdiction of the federal bankruptcy court and require that we alter existing contractual relationships.

The Commission may adopt an emergency rule only when such action "is necessary to avoid an immediate threat to public health, safety or general welfare." 5 M.R.S.A. § 8054. The immediate threat under the current circumstances is the potential financial harm to a single aggregator. Although that aggregator has had a significant impact on the development of Maine's competitive market, this does not transform what is essentially a "private harm" into a "public harm."

Moreover, the federal bankruptcy court now has jurisdiction over Enron's contractual relationships. CES/MECC request that we take action that would require utilities to segregate portions of customer payments that the utilities are contractually required to transfer to Enron. Such action would inappropriately invade the bankruptcy court's jurisdiction. The CES/MECC request could only be appropriate upon the assumption that the bankruptcy court will fail in its responsibility. CES/MECC make a persuasive argument that they are entitled to the administrative fee under the law. If this is the correct interpretation of the law, we assume the bankruptcy court will so decide. If, however, CES/MECC are not entitled to the funds, our intervention to divert the funds would likely violate the bankruptcy court's exclusive jurisdiction.

We are also concerned about actions that would alter existing contractual provisions. CES/MECC are sophisticated market participants and they accepted, through their contractual arrangements, a certain amount of the normal commercial risk of not being paid. In this case, governmental intervention to alter the allocation of commercial risk among contracting parties is not justified.

Finally, we disagree with the notion that immediate action is required under the circumstances because our consolidated billing rules favor suppliers and resulted in the financial risk now faced by CES/MECC. Chapter 322 requires that T&D utilities provide consolidated billing services to competitive suppliers. A similar requirement for consolidated aggregator fee billing was not considered in the rulemaking because no

one suggested that such a requirement be adopted. Although our rules do not require utilities to provide aggregator billing services, nothing prohibits utilities from agreeing to provide such services or the Commission from investigating an unreasonable denial by a utility to provide the service. CES/MECC were not restricted to a single payment option, as suggested in their comments. They could have arranged to be paid directly by customers (either up front or over time) or requested that utilities segregate out their portion of the payments. Although unfortunate in retrospect, CES/MECC accepted the risks associated with obtaining payments of their fees from Enron.

Although we are reluctant to interfere with existing contracts, it is appropriate to consider whether utilities should be required prospectively to bill fees for aggregator and broker services. We will do so in the near term through rulemaking procedures.

Dated at Augusta, Maine, this 8th day of January, 2002.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.